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No. 09-369

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAWN MAGGARD and DARRELL MAGGARD,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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Ford Motor Company offers no persuasive reason why the Court should not remand this case to the court of appeals to allow the court to reconsider its opinion in light of *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009). The court of appeals majority opinion appears to improperly allocate the burden of persuasion to the appellees, and it purports to be unable to determine the effect of the trial court error on the jury's decision. The dissenting opinion properly allocates the burden of persuasion, and it concludes that the error was harmless. A remand to allow the court of appeals to properly allocate the burden of persuasion would serve the interests of justice and judicial economy.

A. *Shinseki* is sufficiently "new" to warrant remanding this case to the court of appeals.

Shinseki is the first case in which this Court has held that the allocation of the burden of persuasion on harmless error in ordinary civil cases differs from that in criminal and habeas corpus cases. Before *Shinseki*, courts of appeals including the Sixth Circuit held that the harmless error rule in criminal and civil cases was the same, *e.g., Stockler v. Garratt*, 974 F.2d 730, 732 (6th Cir. 1992), and applied or purported to apply *Kotteakos v. United States*, 328 U.S. 750 (1946), in civil cases. In *Shinseki*, this Court held for the first time that the allocation of the burden of persuasion on harmless error in civil cases differs from that in *Kotteakos*. 129 S. Ct. at 1706 (citing *Kotteakos* as an example of a criminal case in which the burden of

persuasion is placed on the appellee when the matter underlying review is criminal).

Ford correctly points out that *Shinseki* relies in part on decisions going back to the 1943 case *Palmer v. Hoffman*, 318 U.S. 109, 116, which holds that the party claiming error bears the burden of showing prejudice. (Brief in Opposition, at 1). But this Court has described *Palmer* as a "pre-*Kotteakos*" case involving mere "technical errors." *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995). And as recently as 1995, this Court has suggested that allocation of the risk of appellate uncertainty on harmless error is the same in civil and criminal proceedings. *Id.* at 441-42. Further, as is set out in the Maggard's petition, before *Shinseki*, four federal circuit courts of appeals had held that the appellee in a civil appeal has the burden of persuasion on harmless error. (Petition, at 9, nn.2, 3).

Although *Shinseki* does not involve reversal of any settled precedent, it is sufficiently "new" to warrant remanding this case to the court of appeals for reconsideration.

B. There is a reasonable probability that the court of appeals improperly allocated the burden of persuasion.

Ford points to *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004), as proof that it is possible to properly allocate the burden of persuasion while using the same articulation of the harmless error standard

used by the court of appeals majority opinion in the pending case. *Beck* states that an appellant must "deprive the appellate court of fair assurance that the error was not outcome determinative." *Id.* at 635. There are at least three problems with Ford's reliance on *Beck*.

First, the question is not whether it is *possible* that the majority opinion properly allocated the standard of review. The question is whether there is a reasonable probability that the majority opinion improperly allocated the burden of persuasion. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Second, the majority opinion in the pending case does purport to follow *Beck*. The opinion does not cite or quote *Beck*, and it does not include any language indicating that the burden of persuasion is on the appellant. To the contrary, the majority opinion takes its statement of the harmless error standard from *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398 (6th Cir. 2006), which relies on *DePew v. Anderson*, 311 F.3d 742, 751 (6th Cir. 2002), which relies on *Kotteakos*. In *Shinseki*, this Court held that *Kotteakos*'s allocation of the burden of persuasion on harmless error does not apply in civil appeals. 129 S. Ct. at 1706.

Third, *Beck* actually demonstrates how unnatural it is to use the language "fair assurance that the error was not outcome determinative" when allocating the burden of persuasion to the appellant. The *Beck* articulation is convoluted and difficult to

understand. Aside from the confusing double-negative, it is unclear what exactly it means to have the burden of depriving a court of a fair assurance. The statement has been interpreted to mean that the appellant must "show by something less than a preponderance of the evidence that the error was not outcome-determinative." Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review*, at 87 (2007). But the step below "a preponderance of the evidence" is "equally balanced evidence," at which point the burden of persuasion should be conclusive.

Whether or not the *Beck* standard is intelligible, the relevant point is that the *Beck* articulation of the harmless error standard is unnatural. It is therefore unlikely that the court of appeals in the pending case intended to imply that the appellant has the burden of persuasion when it stated that the question was whether it could say with "fair assurance" that the verdict "was *not* substantially swayed by the error." (App. 19-20) (emphasis added). The more natural articulation when placing the burden on the appellant is that used by the dissent, which asked whether it is likely that the verdict "was" affected by the error. (App. 26-27). When placing the burden on the appellee, the natural articulation is that used in *Shinseki* when the Court refers to "the burden of proving that a notice error did *not* cause harm." 129 S. Ct. at 1706 (emphasis in original). By considering whether the verdict "was not" swayed by the error rather than whether the verdict "was" swayed, the

majority opinion implies that the burden of persuasion is on the appellee.

To establish that a GVR is appropriate, the Maggards need only establish a reasonable probability that the majority opinion applied a standard inconsistent with *Shinseki*. *Lawrence*, 516 U.S. at 167. This degree of probability is established by (1) the difference in the language used by the majority and the dissent in articulating the standard, (2) the difference in the conclusions reached by the majority and the dissent, and (3) the majority opinion's professed inability to determine what effect the error had on the jury.

C. On remand, the court of appeals would have good reason to conclude that the exclusion of the trial testimony was harmless.

In support of its contention that there is a reasonable probability that the court of appeals would reach a different conclusion on remand, the Maggards explained that the excluded testimony supported a theory of how the accident occurred that is inconsistent with Ford's contentions in the final pretrial order and with the opinions of Ford's expert witnesses. In response, Ford changes the subject.

Ford argues in various ways that the excluded evidence was relevant and reliable. (Brief in Opposition, at 1, 4, 6-7). But the Maggards' petition did not

assert that the excluded evidence was irrelevant or unreliable.[1] The Maggards' primary argument is that the excluded evidence is inconsistent with Ford's contentions at trial, including binding judicial admissions. In response, Ford barely acknowledges this argument, referring to "certain arguments advanced by petitioners" and "counter-arguments advanced by petitioners." *Id.* at 7. And Ford does not actually respond to the argument at all, except to note that the court of appeals majority was evidently unpersuaded. *Id.*

Obviously, the question whether exclusion of the trial testimony was harmful or harmless is not appropriate for resolution by this Court at this stage of the proceedings. The question for this Court is whether there is a reasonable probability that *Shinseki* would affect the outcome on remand. *See Lords Landing*

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[1] The record does, however, indicate that Officer Capps' version of Holly Maggard's statements is unreliable. Capps' deposition testimony suggests that he may have developed his theory of the cause of the accident before he spoke to Holly, when he interviewed emergency responders who had not witnessed the accident. In its Memorandum and Order addressing Ford's post-trial motions, the trial court described Capps' recollections as "cloudy," and noted that "[a]lthough, in some places, Office Capps stated that Holly Maggard told him specific things, in other parts of the deposition, he stated that he was not sure who told him what because he was talking to lots of different witnesses in a short timeframe." (November 30, 2007 Memorandum and Order, at 8). Further, in her deposition and at trial, Holly Maggard testified that she did not make the statements that Officer Capps attributed to her.

Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893, 895-96 (1997). Ford's inability to address the Maggard's primary argument that the error was harmless supports the conclusion that if the court of appeals were to properly allocate the burden of persuasion to Ford, it would resolve its doubts about the effect of the trial error in favor of the Maggards and conclude that the error was harmless.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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